No. 82-2011

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

In the Matter of a Grand Jury Subpoena Directed to
MARC RICH + CO. A.G., A Swiss Corporation.

MARC RICH + CO. A.G.,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

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The brief in opposition, in dealing with the basic question of jurisdiction, obscures the issue by references to numerous authorities that have no bearing on the subject, which is the extraterritorial reach of grand jury process. For all the government's citations, no authority whatever supports the decision

below.[1] The dismissal of the use of secret evidence for a contempt adjudication and enormous fines as a matter reviewable only for "abuse of discretion" (Br. in Opp. 13, citing nothing) tends to underscore the need for review. The novel questions presented took the court of appeals over six months of study after an expedited appeal calling for briefs in a matter of days, and then were decided on grounds basically in disagreement with the district court's, followed by a stay granted over the government's opposition. These questions remain important and unanswered. This short reply is tendered to resist the obscuring of the grounds for this position.

1. In dismissing as trivial the petitioner's claim that there has been in this case an unprecedented extension of grand jury subpoena power, the government in the end relies only upon "common sense, as well as accepted principles underlying the grand jury's investigative authority." (Br. in Opp. 7.) It will be seen that there is wholly absent from the brief in opposition (as there is from all the relevant books we have been able to discover) a single citation to support the use of long-arm jurisdiction as a basis for a grand jury subpoena. Slipping past this striking absence of relevant authority, the government simply merges, and treats as identical, situations involving (a) civil adjudicatory jurisdiction under long-arm *statutes* and (b) jurisdiction to found a grand jury subpoena on a *nonstatutory* long-arm theory, actually in conflict with the only statute and rule touching the subject.[2]

2. The brief in opposition also ignores the point that the long-arm rule announced by the court of appeals in this case would be no less available to the states (indeed, perhaps more available since the states have long-arm statutes) than it is now

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1 Cited cases on "the broad investigative authority of the grand jury" (Br. in Opp. 6) are found on inspection to have nothing to do with the jurisdictional and other issues presented here for review.

2 The closest approach to a pertinent citation is a speculative dictum in a district court opinion. *In re Arawak Trust Co. (Cayman) Ltd.*, 489 F. Supp. 162, 165 (E.D.N.Y. 1980). *See* Br. in Opp. 9.

said to be for the federal grand jury. No state appears ever to have claimed such power.[3] The new extension would follow directly, however, from the decision below. The point highlights the extreme departure from basic principles effected by the court of appeals, and foreshadows a vast overseas extension of United States compulsory process, both state and federal, likely to be asserted on the basis of the decision in this case if it is allowed to stand.

3. The repeated insistence (Br. in Opp. 8-9) that the subpoena was "served in this country" (although not on petitioner) tends again to cloud the question presented, which concerns *in personam* jurisdiction. The service was upon a lawyer for petitioner's subsidiary, who took the delivery while expressly refusing to waive any of petitioner's rights to challenge the subpoena. This eliminated, by consent, any supposed need to serve an officer of the subsidiary. But nobody has suggested that the attorney's acceptance operated to confer

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3 States with long-arm statutes do not pretend to have power under them to effect extraterritorial reach of their subpoena power in grand jury or other criminal proceedings. To take a single example, the courts of New York, far from employing their long-arm statute to launch grand jury subpoenas against persons or corporations beyond their borders, *disclaim* extraterritorial subpoena power *of any kind*. "While under the 'long-arm' statute, a summons may be served outside the State, there is no such provision for a subpoena." *Siemens & Halske* v. *Gres*, 37 A.D. 2d 768, 324 N.Y.S.2d 639 (1st Dep't 1971); *Israel Discount Bank Ltd.* v. *P.S. Products Corp.*, 65 Misc. 2d 1002, 319 N.Y.S.2d 554 (Sup. Ct. N.Y. Co. 1971). This is the elemental reason why all 50 States, as well as the District of Columbia, Puerto Rico, and the Virgin Islands, have adopted the Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Proceedings. It is by that Act, and by reciprocal applications to each other, not by attempted long-arm thrusts of their own claimed power, that New York and other states can seek delivery of a witness desired for an "investigation by a grand jury or in a criminal action, prosecution or proceeding." N.Y. Crim. Proc. Law § 640.10(1) (McKinney 1971). *See People* v. *Cavanaugh*, 69 Cal.2d 262, 265-66, 70 Cal. Rptr. 438, 440-41 (1968), *cert. denied*, 395 U.S. 981 (1969). See, Pet. for Cert. 13-14, the identical position of the federal courts in the international sphere.

long-arm or any other species of *in personam* jurisdiction over petitioner.

4. In two modest-sized paragraphs, with no reference to authority, the government announces that a finding of contempt, with the ordering of Draconian penalties, is justifiable on the basis of *in camera* evidence, subject only to an improbable and undefined standard of "abuse of discretion" (Br. in Opp. 12-13). We have undertaken to show (Pet. for Cert. 18-19) that the courts of appeals, including at least one other panel of the court below, have treated this problem as a far more difficult one, stirring questions of constitutional moment, and not lying within substantially uncontrolled discretion. That the Solicitor General appears to consider a decision to use secret evidence virtually beyond review—even where, as here, *ex parte* material is used to show a mere "reasonable probability" that a novel foreign jurisdictional basis could be proved—emphasizes, in petitioner's submission, the need for this Court's intervention.

Respectfully submitted,

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